**STATE OF MICHIGAN**
**EMPLOYMENT RELATIONS COMMISSION**
**LABOR RELATIONS DIVISION**

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

Case No. C06 G-170

-and-

ASSOCIATION OF MUNICIPAL INSPECTORS,
Labor Organization-Charging Party.
_____/

APPEARANCES:

City of Detroit Law Department, by Bruce A. Campbell, Esq., for the Respondent

Webb Engelhardt & Fernandes PLLC, by L. Rodger Webb, Esq., for the Charging Party

## DECISION AND ORDER

On September 14, 2007, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent, City of Detroit, violated its duty to bargain in good faith when it threatened to implement changes in terms and conditions of employment before the parties had reached a good faith impasse in their negotiations for a new contract. The ALJ found that Respondent violated Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e) and recommended that the Commission issue a cease and desist order. The ALJ, however, rejected the contention of Charging Party, the Association of Municipal Inspectors (Union), that Respondent had engaged in other conduct that violated its duty to bargain in good faith. She found no merit in the allegation that Respondent had adopted a "take it or leave it" approach when making its proposal in negotiations and further found no PERA violation when Respondent reminded Charging Party that it would withdraw its health care plan proposal if it was not accepted by July 1, 2006. Finding that Respondent's proposal to place a moratorium on layoffs was tied to wage and other concessions, the ALJ held that Respondent did not act in bad faith when it laid off employees following Charging Party's rejection of the proposed concessions. The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA.

After requesting and receiving two extensions of time in which to file exceptions, Charging Party filed exceptions to the ALJ's Decision and Recommended Order on November

13, 2007. In its exceptions, Charging Party alleges that the ALJ erred in finding that Respondent did not adopt a "take it or leave it" position with respect to its health care proposal. Charging Party also excepts to the ALJ's finding that Respondent did not violate its duty to bargain in good faith by laying off unit employees following its rejection of Respondent's contract proposal. Respondent did not file a response to the exceptions; nor did it file its own exceptions to the ALJ's Decision and Recommended Order.

We have reviewed Charging Party's exceptions and find them to be without merit.

Factual Summary:

We adopt the factual findings of the ALJ and recite them only as necessary here.

The collective bargaining agreement between Charging Party and Respondent was executed on May 2, 2005; it expired less than 2 months later, on June 30, 2005. The parties did not begin negotiating a new collective bargaining agreement until Respondent had already reached a new contract with its largest bargaining unit, represented by Council 25 of the American Federation of State, County and Municipal Employees (AFSCME). AFSCME's contract with Respondent also expired on June 30, 2005.

In its negotiations with AFSCME, Respondent proposed changes to its existing health care plan, a wage freeze, and a ten percent reduction of hours worked each pay period, referred to by Respondent as days off without pay, or DOWOPs. AFSCME proposed an "alternative health care plan," and Respondent indicated that it would agree to the alternative plan on the condition that it would take effect no later than July 1, 2006. On April 27, 2006, Respondent offered AFSCME a four percent wage increase effective on the last day of the contract, or June 30, 2008, and a moratorium on layoffs for the period during which DOWOPs were in effect. AFSCME's membership rejected Respondent's offer.

On May 15, 2006, Respondent sent a letter to all labor organizations representing non-uniformed employees with which it did not then have a contract, including Charging Party and AFSCME. In this letter, Respondent advised, in part: "In order to produce the necessary cost savings for the City the ten percent reduction in the hours of work and the 'City Alternative Health Care Proposal' must be in place by July 1, 2006. Therefore, it is imperative that an agreement is reached immediately in order to allow sufficient time to reach a tentative agreement and ratification of the contract and also to conduct an open enrollment prior to the July 1, 2006 implementation schedule." It also warned that failure to reach agreement on health care would prompt Respondent to revert to an earlier proposal and that "failure to reach agreement for a ten percent reduction in work hours may result in further reductions in force."

On May 26, 2006, Respondent presented Charging Party with a set of contract proposals that had been prepared for another labor organization and advised that its proposal to Charging Party would be exactly the same. Between mid-May and mid-June, Respondent presented proposals to all the unions with which it did not yet have collective bargaining agreements, except those representing uniformed employees. The proposals included a change to the alternative health care plan effective July 1, 2006, DOWOPS equaling ten percent of salary

between July 1, 2006 and July 1, 2007, a four percent wage increase effective June 30, 2008, and a moratorium on layoffs while the DOWOPS were in effect. On June 19, 2006, a MERC fact finder issued his Report recommending that the Detroit Building Trades Council (DBTC) and Respondent adopt the proposals. Around the same time, another fact finder informed Respondent and AFSCME that he, too, would be recommending that the parties agree to Respondent's proposals.

On June 28, Respondent sent identical letters to representatives of the unions with which it still had no agreement, including Charging Party. The letter stated: "at the close of business, Friday, June 30, 2006, the City will withdraw the 'City Alternative Health Care Proposal' from the table as well as any other economic or non-economic incentive offers made contingent upon the parties reaching an expedited agreement." The letter continued with the following admonition:

> The City will return to its official table position with regard to health care, namely the medical plan recommended by MERCER, which has already been presented to all labor organizations. Further, the City wage proposals will be 0% for Fiscal Year 2005/2006; 10% reduction in work hours for Fiscal Year 2006/2007; 0% for Fiscal Year 2007/2008.
>
> All the incentives placed on the table by the City for the purpose of reaching an agreement will be withdrawn. These incentives include, but are not limited to, the 4% increase at the end of the contract period, no lay off provisions for the duration of the concession period and the "me too" or protection clause. Miscellaneous incentives offered to specific bargaining groups will also be withdrawn.

Respondent concluded this letter by stating that if there were no agreement by July 1, 2006, it would consider the parties to be at impasse. Between July 1 and July 19, three of the seventeen housing rehabilitation specialists represented by Charging Party were laid off. Respondent did not impose DOWOPS on Charging Party's members, alter their health insurance benefits, or make any other changes in their existing terms and conditions of employment.

Discussion and Conclusions of Law:

In its exceptions, Charging Party alleges that the ALJ erred in finding that Respondent did not adopt a "take it or leave it" position by putting forth a health care proposal containing a warning that if Charging Party did not accept the proposal by July 1, the proposal would be withdrawn. We disagree. The July 1 deadline date was not arbitrarily set; instead it was tied to the beginning of the new fiscal year and the imminent need to obtain concessions in the City's health care costs for them to have the most impact. The financial crisis that Respondent faced is well documented in the record; we, therefore, will not infer a retaliatory or otherwise improper motive from the Employer's warning. *Michigan State Univ (Dep't of Pub Safety)*, 1983 MERC Lab Op 587.

We agree with the ALJ that Respondent did not adopt a "take it or leave it" position with respect to the offer presented to Charging Party on May 15. As the ALJ noted, while the parties met only once between May 1 and July 1, Respondent was clear in its intention and need to seek

imminent concessions from Charging Party and its other bargaining units. Respondent was also clear in its warning to Charging Party that bargaining unit members might suffer additional layoffs if the Union did not agree to DOWOPs by the beginning of the fiscal year on July 1. Yet, the Employer did not refuse to entertain counterproposals from the Union during this two-month period or refuse to meet with Charging Party during that time.

We have considered all other arguments and exceptions and conclude that they would not change the result in this case.

## ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

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APPEARANCES:

Bruce A. Campbell, Esq., City of Detroit Law Department, for the Respondent

L. Rodger Webb, Esq., for the Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, this case was heard at Detroit, Michigan on December 19, 2006, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before March 27, 2006, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Association of Municipal Inspectors (AMI) filed this charge against the City of Detroit on July 18, 2006. The charge was amended on July 24, 2006. Charging Party represents a bargaining unit of housing rehabilitation specialists employed in Respondent's planning and development department. The charge, as amended, alleges that on June 28, 2006, Respondent violated its duty to bargain in good faith when it threatened to impose changes in terms and conditions of employment at a time when the parties had not reached either agreement or a good faith impasse on the terms of a new collective bargaining agreement.

Facts:

The housing rehabilitation specialists in Charging Party's bargaining unit monitor and administer federal grants that fund the repair and construction of low-income housing within the

City of Detroit. Their wages are paid from the grant funds. In early 2006, Respondent employed seventeen housing rehabilitation specialists.

The last collective bargaining agreement between Charging Party and Respondent was executed on May 2, 2005 and expired only two months later, on June 30, 2005. Traditionally, Charging Party and Respondent do not begin negotiating a new collective bargaining agreement until Respondent has reached a new contract with Council 25 of the American Federation of State, County and Municipal Employees (AFSCME), the labor organization representing the largest single group of Respondent's employees. AFSCME's contract also expired on June 30, 2005, and Respondent and AFSCME began negotiating a new agreement in May 2005. Neither AMI nor Respondent sought to open negotiations for a successor contract in 2005.

In 2004 or early 2005, Respondent hired a health care consultant, the William Mercer Company, to recommend changes to the health insurance plans covering Respondents' employees that would help Respondent curb its rising health care costs. Mercer's recommendations, known as the Mercer plan, substantially increased the premiums paid by employees for both preferred provider (PPO) and health maintenance (HMO) health coverage. The Mercer plan also included higher deductibles and co-pays, including significantly higher co-pays for prescription drugs. On May 13, 2005, Respondent held a meeting with representatives of the labor organizations representing its various bargaining units to describe and explain the plan. Respondent's May 7, 2005 letter inviting union representatives to the meeting concluded with the following paragraph:

> It goes without saying, the City of Detroit intends to continue providing good health care coverage to our employees and retirees – we just can't afford the cost increases necessary to provide such benefits in the exact same programs we have today. We must do something <u>immediately</u> to make changes required to reduce the City's current cost and reverse or retard the rate of their increases in the future – *you all know that to be necessary*. We need the committed participation of <u>everyone.</u> [Emphases in original]

Charging Party president Michael Neil attended the May 13 meeting with other union representatives. The meeting was somewhat chaotic, as union representatives repeatedly interrupted the Mercer representatives' presentation to raise objections to the plan.

In the spring of 2005, Respondent was facing a large deficit. In its negotiations with AFSCME, it stressed its dire financial situation and its need to obtain wage and health care concessions from all its unions. Respondent's initial contract proposals to AFSCME included replacement of employees' existing health care benefits with those contained in the Mercer plan. Respondent also proposed a wage freeze for the length of their agreement. In addition, it proposed to reduce employees' salaries by ten percent during the first year of the contract by reducing the number of hours they worked each pay period by ten percent. The reduction in hours was referred to by Respondent as days off without pay, or DOWOPs, although the proposal allowed each of Respondent's departments to determine what type of reduced schedule its employees would work, e.g., a workweek with one eight hour and four seven hour days, a four day workweek of nine hour days, etc.

During negotiations, AFSCME proposed various changes to the Mercer plan. The changes proposed by AFSCME became known as the "alternative health care plan." Sometime before April 2006, Respondent indicated that it would agree to the alternative plan on the condition that it take effect no later than July 1, 2006. Respondent told AFSCME that although the alternative health care plan was more expensive than the Mercer plan, Respondent believed that it could achieve its targeted cost savings with the alternative plan if it was implemented by that date. AFSCME and Respondent bargained intensely in the spring of 2006, but were unable to reach agreement on a contract. While Respondent and AFSCME negotiated, the City's financial situation deteriorated further. On April 27, 2006, on the eve of hearings before fact finder William Long, Respondent offered AFSCME a four percent wage increase effective on the last day of the contract, or June 30, 2008, and a moratorium on layoffs for the period during which DOWOPs were in effect as an incentive to reach agreement before July 1. AFSCME's membership rejected Respondent's offer.

On May 15, 2006, Respondent sent a letter to all labor organizations representing non-uniformed employees with which it did not then have a contract. The letter received by Charging Party president Michael Neil read as follows:

> RE: Negotiation of the 2005-2008 Master Agreement
>
> Dear Mr. Neil:
>
> The City of Detroit is not alone in facing tough economic conditions; however it will take a cooperative team effort from all of us to make the necessary changes in order to become financially solvent. As you are aware, we are seeking a ten percent reduction in the hours of work and savings in health care costs from employees represented by your labor organization. Therefore, it is necessary to meet with you as soon as possible for negotiations in order to effectuate the necessary cost savings measures by July 1, 2006.
>
> As you are aware, the soaring cost of health care benefits has substantially contributed to the City's financial dilemma; therefore a health care proposal based on a medical plan recommended by MERCER, a nationally recognized health care consulting firm, has already been presented to the labor organizations. It is now time for difficult decisions to be made and to make such decisions more palatable, the City is now proposing a "City Alternative Health Care Proposal" as enclosed. This proposal modifies the contribution structure. In order to produce the necessary cost savings for the City the ten percent reduction in the hours of work and the "City Alternative Health Care Proposal" must be in place by July 1, 2006. Therefore, it is imperative that an agreement is reached immediately in order to allow sufficient time to reach a tentative agreement and ratification of the contract and also to conduct an open enrollment prior to the July 1, 2006 implementation schedule.

> If an agreement is not reached in time to implement the alternative health care plan by the start of the fiscal year, this will result in the health care proposal based on a medical plan recommended by MERCER remaining as the City's table negotiating position. Also, failure to reach agreement for a ten percent reduction in work hours may result in further reductions in force. These actions will be necessary in order to recoup lost savings that would have been generated if such proposals had been timely implemented.
>
> Therefore, time is of the essence. It is our intention to wrap up negotiations for the 2005-2008 Master Agreement with your labor organization within the next few weeks and working together as a team will allow us to achieve this goal. This is possible because the only substantive changes the City is proposing to the collective bargaining agreement involve the aforementioned cost saving measures to pare down escalating health care costs and to stabilize personnel costs.
>
> We are looking forward to meeting with you in negotiations and reaching an agreement. If you have any additional questions regarding this matter and to establish a negotiation meeting date, please call [the labor relations office] in order to be directed to the Labor Relations Specialist assigned to your bargaining group.

Attached to this letter were a three page document entitled "City Alternative Health Care Proposal May 15, 2006," which incorporated the modifications to the Mercer plan originally suggested by AFSCME, and documents comparing the benefits provided by the alternative health care plan and the benefits employees received under their current plan. The "City Alternative Health Care Proposal" included the following language:

> This "City Alternative Health Care Plan" is conditioned upon the city achieving the specific cost saving objectives professionally-estimated and calculated to result from the implementation of all the features contained in this proposal and based on beginning at the start of the FY 2006-2007 benefit year. The health care benefit plan changes specified in the attached document will be effective July 1, 2006. The corresponding open enrollment for the purposes of implementing this "Alternative Health Care Plan" will be held prior to implementation. The attached "Alternative City Health Care Proposal" must be TA'd through the negotiation process and ratified by the union membership in sufficient time to meet a July 1, 2006 implementation schedule.
>
> * * *
>
> As stated above, this Alternative Health Care Proposal package is conditioned upon the City receiving specific cost saving objectives effective July 1, 2006. If the parties are unable to reach agreement to achieve the cost savings, the City reserves the right to go back to its original position regarding health care, as expressed in its proposal and commonly referred to as the "Mercer Plan."

Also attached to the May 15 letter was a four-page proposed memorandum of understanding (MOU) titled "Wage Concessions." The MOU began, "The parties enter into this agreement for the purpose of reducing the standard payroll work period of the membership by 10% during the temporary period July 1, 2006 through June 30, 2007." The proposal explained the work schedule options available to departments and how holiday and paid time off would be handled. The proposal concluded with a provision stating that no bargaining unit employee on the payroll at the time of the ratification of the agreement would be laid off from July 1, 2006 through June 30, 2007. Neither the May 15 letter nor the documents attached to it mentioned any type of wage increase.

The May 15 letter was the first written communication between Charging Party and Respondent regarding a successor to their 2002-2005 contract. Neil met with Respondent relations specialist Anita Berry on Friday, May 26. At that meeting, Berry presented Neil with a set of contract proposals prepared for another labor organization. She told him that Respondent's proposal to Charging Party would be exactly the same, and that she would have proposals ready for him by the next workday. Berry and Neil went over the changes in health care benefits contained in the alternative health care plan proposal, and Berry explained to Neil how employees might be affected differently based on their level of use. Neil asked Berry how much Respondent was going to save if these changes were implemented for Charging Party's unit. Berry could not answer that question, but told him that Respondent expected its savings city-wide to be about $47 million. Neil then told Berry that reducing the hours and salaries of his unit members made no sense, because the housing rehabilitation specialists were paid entirely from federal grant funds, not from Respondent's general fund. Neil pointed out that any grant funds left unspent at the end of the grant year would have to be returned to the federal government, and that returning unspent funds would reduce the amount of the following years grant. Neil also said that the proposed moratorium on layoffs was not that much of a benefit to his unit because housing rehabilitation specialists would have to be laid off in any case if the federal government reduced the amount of the City's grants. Berry told Neil that departments had some discretion to reject DOWOPs for their employees if they could show need. She said that DOWOPs were not practical for the police or fire department, and that maybe a case could be made that they were not practical for Charging Party's unit as well. Neil and Berry agreed that he would talk to managers in the planning and development department.

May 26, 2006 was the Friday before Memorial Day. On about May 30, Neil picked up a packet of documents from Berry's office. Contained in this packet was proposed new language for Article 18 of the parties' contract, titled "Hospitalization, Medical, Dental and Optical Care Insurance." The language was exactly the same as Article 18 of the parties' 2002-2005 agreement except for the first sentence, which read, "Changes to this Article are reflected in the Memorandum of Understanding Re Alternative Health Care Plan." Attached to the proposed new Article 18 was another copy of the "City Alternative Health Care Proposal" sent originally to Charging Party on May 15, and additional documents comparing Respondent's costs, i.e. the monthly cost to the City per employee for single, double and family coverage, under the Mercer, alternative, and existing health care plans. The packet also included a proposed new contract Article 32, which read as follows:

General Wage Increases

| | |
|---|---|
| 1. Effective July 1, 2005 | 0% |
| 2. Effective July 1, 2006 | 0% (See MOU RE Wage Concessions) |
| 3. Effective July 1, 2007 | 0% |
| Effective June 30, 2008, 11:59 pm | 4% No retroactive amounts shall be attributable to any period between July 1, 2005 and June 30, 2008 |

Attached to the new Article 32 was another copy of the "Wage Concessions" MOU sent to Neil on May 15.[1]

Shortly thereafter, Berry called Neil to ask whether he had met with representatives of the planning and development department about the DOWOPs. Neil replied that he had spoken with his general manager, who told him that upper level management in the department was in the process of deciding what to do about them. The record does not indicate whether Neil ever received a response from the planning and development department.

Between mid-May and mid-June, Respondent presented proposals to all the unions with which it did not then have collective bargaining agreements, except those representing uniformed employees. The proposals made to every union included these terms: (1) a change to the alternative health care plan effective July 1, 2006; (2) DOWOPS equaling ten percent of salary between July 1, 2006 and July 1, 2007; (3) a four percent wage increase effective June 30, 2008; and (4) a moratorium on layoffs while the DOWOPS were in effect. After the members of one union, the Detroit Building Trades Council (DBTC), rejected Respondent's proposal, the DBTC requested fact finding. On June 19, 2006, fact finder George Roumell issued a report recommending that the DBTC and Respondent adopt the tentative agreement rejected by the DBTC membership. Around the same time, fact finder Long informed Respondent and AFSCME that he would also be recommending that the parties agree to the alternative health care plan, DOWOPs, the moratorium on layoffs, and the four percent wage increase effective June 30, 2008.

On June 19, Neil wrote to Berry suggesting that the parties meet again. In his letter, Neil stated that Charging Party had not yet received "a formal proposal for the health care portion, or a draft of the MOA referenced." Neil testified that during their discussion on May 26, Berry had responded to several of his questions about the alternative health care plan by saying that the parties "would handle it with a MOU," and this was the MOU he was waiting for. Berry testified that she thought that Neil was simply confused by the reference to the alternative health care proposal as a "memorandum of understanding" in the first sentence of Article 18, since the proposal was not in the usual form of a MOU. Berry testified that after she received Neil's letter, she called Neil and tried to set up a meeting, but that the parties could not find a mutually agreeable date until after July 1. Neil testified that a few days after the June 19 letter, Berry called him and told him that "either she had sent the information or that she forgot and would send it again." Neil did not make another request to meet.

[1] Neil testified that the packet also included a proposed draft of an entire contract covering the term 2005-2008, with all other items remaining the same from the previous agreement. However, Neil did not have a copy of this proposal at the hearing.

Neither AFSCME nor the DBTC entered into a contract agreement with Respondent after issuance of the Roumell and Long fact finding reports. However, both unions informed Respondent that they would not challenge Respondent's unilateral implementation of changes consistent with the fact finders' recommendations. By about the third week of June, Respondent had reached agreements incorporating DOWOPs and the alternative health care plan with all but about seven or eight of its other unions. These remaining unions, including Charging Party, represented only about five hundred of Respondent's approximately 7,000 organized non-uniformed employees.

On June 28, Respondent sent identical letters to representatives of unions with which it still had no agreement, including AMI. The letter Neil received read as follows:

> As of this date, the city has not received confirmation that the tentative agreements reached (or City proposals made) during negotiations have been ratified by your membership. As you know, the City's proposals and the tentative agreements enter into were conditioned on achieving a ratified agreement by July 1, 2006. By letter dated May 15, 2006, the City advised of the importance of completing negotiations for the 2005-2008 Master Agreement by July 1, 2006 in order to realize necessary cost savings through implementation of a ten-percent reduction in the hours of work and adoption of the "City Alternative Health Care Proposal."
>
> Therefore, effective at the close of business, Friday, June 30, 2006, the City will withdraw the "City Alternative Health Care Proposal" from the table as well as any other economic or non-economic incentive offers made contingent upon the parties reaching an expedited agreement.
>
> The City will return to its official table position with regard to health care, namely the medical plan recommended by MERCER, which has already been presented to all labor organizations. Further, the City wage proposals will be 0% for Fiscal Year 2005/2006; 10% reduction in work hours for Fiscal Year 2006/2007; 0% for Fiscal Year 2007/2008.
>
> All the incentives placed on the table by the City for the purpose of reaching an agreement will be withdrawn. These incentives include, but are not limited to, the 4% increase at the end of the contract period, no lay off provisions for the duration of the concession period and the "me too" or protection clause. Miscellaneous incentives offered to specific bargaining groups will also be withdrawn.
>
> Time has practically run out for the members of your labor organization to participate in the city Alternative Health Care Plan design. A decision has to be made now regarding the cost savings measures proposed by the City to reduce health care costs and to stabilize personnel costs. Any further delay may eliminate

> viable options that are presently available and beneficial to your labor organization.
>
> If there is no agreement by July 1, 2006, the City will consider the parties to be at impasse and will so advise MERC. The City will then take all steps available to it to bring the matter to conclusion. If you have any additional questions regarding this letter, please call the Labor Relations Specialist assigned to your bargaining group.

Neil testified that he received this letter on the morning of June 30.

On July 1, 2006, DOWOPs went into effect for members of the AFSCME and DBTC units and all units that had agreed to them. Respondent scheduled an open enrollment period for its health insurance plans in August, and the change to the alternative health care plan went into effect for employees whose unions had agreed to it in September 2006. Between July 1 and July 19, three of the seventeen housing rehabilitation specialists represented by Charging Party were laid off. Respondent did not impose DOWOPS on Charging Party members, alter their health insurance benefits, or make any other changes in their existing terms and conditions of employment.

Charging Party and Respondent met again on July 19, 2006. At this meeting, Respondent gave Charging Party a comprehensive proposal for a contract covering the period 2005-2008. Article 18 in this proposal was the same as Article 18 in the existing contract, with the exception of the first sentence. This sentence read, "The City's official table position is the medical plan recommended by MERCER, including changes in prescription drug benefits." The four percent wage increase effective June 30, 2008 was deleted from Article 32, but the reference to the "attached MOU" remained. Attached to Article 32 was a copy of the "Wage Concessions" MOU that Charging Party had received previously with the no layoff language deleted. Respondent also proposed to modify seven other contract articles, including the provisions governing the work week/workday article, longevity pay, sick leave, funeral leave, jury duty leave, tuition reimbursement, and layoff and recall. Respondent told Charging Party that the alternative health care plan, the four percent wage increase and the no layoff promise were now off the table. Charging Party said that it was willing to accept the alternative health care plan but not the DOWOPS. It asked if it was still possible to enroll employees in the new plan. It also asked Respondent for an explanation of how DOWOPS for the grant-funded housing rehabilitation specialists would result in savings for the City. It asked Respondent for copies of the grants, and for information regarding budgeted positions in the planning and development department. Charging Party also asked for copies of contracts reached between Respondent and other unions before July 1 that included the alternative health care plan and DOWPS, and for a list of all the bargaining units that had not agreed to Respondent's proposals. Berry said again that the alternative health care plan proposal was off the table. As of the date of the hearing, Charging Party had not yet received all the information it requested on July 19.

Discussion and Conclusions of Law:

Charging Party asserts that Respondent's conduct as a whole demonstrates that it did not approach the bargaining process with "an open mind and a sincere desire to reach an agreement," as PERA requires. *Detroit Police Officers Assn v Detroit*, 391 Mich 44, 54; *City of Springfield*, 1999 MERC Lab Op 399, 403. Charging Party points to the following conduct as examples of Respondent's bad faith:

> (1) Presenting a contract with significant concessions on an effectively immediate take or leave it basis, or face onerous consequences; (2) threatening to declare and act on an impasse on an overnight basis should the Union fail to agree to the City's contract proposal within a matter of hours; (3) failing to meet with the Union between May 26 and July 19 to attempt to address the Union's manifestly legitimate concerns, and even to consider same, and (4) laying off a substantial portion of the AMI bargaining unit when it was not able to conform to the City's impossible to accomplish time demands.

As Charging Party points out, the determination of whether an employer has bargained in good faith must be based on the totality of its conduct. In 2005, Respondent, with the aid of a consultant, put together a package of changes to existing health care benefits which shifted more of the cost of providing these benefits from Respondent to employees. On May 13, 2005, Respondent held a meeting with representatives of all the unions representing its employees, including Charging Party to explain the changes outlined in the plan. That same month, Respondent began negotiating a new contract with its largest union, AFSCME. Respondent's initial proposals included the health care changes contained in the Mercer plan. As Charging Party points out, the May 13 meeting was not a negotiating session. However, Charging Party was or should have been aware that Respondent intended to propose changes to their health care plan along the lines of the Mercer plan when the parties began negotiating a successor to their 2002-2005 contract.

Respondent's proposals to AFSCME also included a wage freeze and DOWOPs to address Respondent's financial problems. As was the practice, contract negotiations between Respondent and many of its smaller unions, including Charging Party, were put on hold pending conclusion of the AFSCME negotiations. Between May 2005 and May 2006, Respondent's financial situation worsened. As fact finders Roumell and Long concluded in their reports, Respondent was facing a genuine financial crisis in May 2006. Although it had not yet concluded negotiations with AFSCME, Respondent decided to make proposals to the unions with which it did not have contracts in the hope of persuading them to enter into new agreements incorporating DOWOPs and changes to existing health care benefits before the start of its new fiscal year on July 1, 2006. As set out in the letter of May 15, 2006 and its attachments, Respondent's initial offer to Charging Party was a three-year contract; the alternative health care plan, a set of changes to the Mercer plan originally proposed by AFSCME; DOWOPs throughout the 2006-2007 fiscal year; and a moratorium on layoffs while the DOWOPs were in effect. All other provisions of the contract between Respondent and Charging Party were to remain the same as in the previous agreement. Respondent's health care proposal clearly stated that if Charging Party did not accept it by July 1, the proposal would be withdrawn and Respondent's position at the

bargaining table would be the Mercer plan. The letter also warned Charging Party that its unit members might suffer additional layoffs if they did not agree to DOWOPs by the beginning of the fiscal year. These were not arbitrary deadlines. Rather, as the fact finders confirmed, Respondent needed to cut employee costs immediately for the new fiscal year through concessions or layoffs. However, Respondent did not threaten in its May 15 letter to make unilateral changes in existing health care benefits or other terms and conditions of employment if Charging Party did not agree to its terms by July 1.

Charging Party argues that Respondent had no intention of engaging in good faith bargaining over the terms of the concessionary contract. According to Charging Party, Respondent presented Charging Party with a "take it or leave it" proposal which Charging Party was supposed to accept immediately without discussion. It is true that when Respondent sent AMI its contract proposal on May 15, 2006, the parties had not even discussed beginning negotiations. The deadline set by Respondent for reaching agreement, July 1, left little time for substantive bargaining. The record indicates, however, that the reason Respondent did not present its offer earlier because it was waiting, as it usually did, for the conclusion of its negotiations with AFSCME. I conclude that Respondent's delay in presenting its proposal was not a tactic to avoid negotiating in good faith. I also find that Respondent did not adopt a "take it or leave it" position with respect to the offer it presented to Charging Party on May 15. The parties met only once between May 15 and July 1. At the meeting, the parties merely discussed the details of the alternative health care plan, and Neil explained why Charging Party believed a reduction in hours for its unit members would not save Respondent any money. Berry suggested that Neil try to persuade the planning and development department to make this argument on its employees' behalf. Respondent's intention to seek concessions from Charging Party was clear in its May 15 letter. However, Berry said nothing at this meeting to indicate that Respondent would not entertain counterproposals. Charging Party, however, did not present Respondent with any proposals before July 1. There is no evidence that Respondent refused to meet with Charging Party between May 15 and July 1.

Charging Party also alleges that on June 28 Respondent "threatened to declare and act on an impasse on an overnight basis should the Charging Party fail to agree to its contract proposal within a matter of hours." PERA prohibits a public employer from making unilateral changes in terms and conditions of employment absent an impasse in its negotiations with the union. *Detroit Police Officers Assoc v Detroit* at 53; *Central Michigan University Faculty Assoc v Central Michigan University*, 404 Mich 268 (1978). The Commission defines a bargaining impasse as the point at which the parties' positions have solidified and further bargaining would be useless. *Oakland Cmty College*, 2001 MERC Lab Op 272, 277; *Wayne County (Attorney Unit)*, 1995 MERC Lab Op 199, 203; *City of Saginaw,* 1982 MERC Lab Op 727. In determining whether the parties have reached a good faith impasse, the Commission looks at a number of factors, including whether there has been a reasonable term of bargaining, whether the positions of the parties have become fixed, and whether both parties are aware of where their positions have solidified. The party asserting impasse bears the burden of establishing that impasse was reached. *Oakland Cmty College*, at 277.

I find that on June 28, 2006, Charging Party and Respondent had not reached a good faith impasse on the terms of their 2005-2008 agreement The parties had had only one meeting.

Charging Party had not presented any proposals or even definitively rejected Respondent's offer. There is no evidence that the parties' positions had solidified. Nothing indicates that either party believed that further negotiations would be fruitless. In fact, as indicated by Respondent's June 28 letter, Respondent expected to return to the bargaining table even if Charging Party failed to accept its offer by the July 1 deadline. As noted above, Respondent's May 15 letter and the proposals it presented to Charging Party stated that its alternative health care plan proposal would be withdrawn if not accepted by July 1, and the no layoff and wage increase offers were tied to Charging Party's acceptance of DOWOPs to begin on July 1. I find that Respondent did not violate its duty to bargain in good faith by reminding Charging Party of this fact in its June 28 letter. However, since the parties were not at impasse on the terms of their contract, Respondent could not lawfully threaten to implement changes in terms and conditions of employment at that time. In its June 28 letter to Charging Party, Respondent wrote, "If there is no agreement by July 1, 2006, the City will consider the parties to be at impasse and will so advise MERC. The City will then take all steps available to it to bring the matter to conclusion." I agree with Charging Party that a reasonable person would interpret this statement as a threat to implement Respondent's "table position" - the Mercer plan and DOWOPs - if the parties had not reached agreement by July 1. The coercive nature of this threat was not altered by the fact that it had no affect on Charging Party's behavior or by the fact that Respondent never actually carried out its threat.[2] I conclude that Respondent violated Sections 10(1)(a) and (e) of PERA when it threatened, by letter dated June 28, 2006, to implement changes in terms and conditions of employment for Charging Party's unit when the parties had not reached a good faith impasse on the terms of their contract.

Charging Party also alleges that Respondent violated its duty to bargain in good faith by laying off unit employees after Charging Party "was not able to conform to the City's impossible to accomplish time demands," i.e., after Charging Party failed to accept Respondent's contract proposal before July 1, and seeks as a remedy that Respondent be required to recall these laid off employees. As discussed above, Respondent's proposals clearly linked the moratorium on layoffs to Charging Party's agreement to DOWOPs beginning on July 1, 2006. The Commission has held that an employer that lays off unit employees after their union has rejected the employer's demand for wage concessions need not demonstrate that wage concessions or layoffs in this unit are necessary for it to meet its financial obligations. *Michigan State Univ (Dept of Public Safety)*, 1983 MERC lab Op 587.

I find that Respondent violated its duty to bargain in good faith under Section 10(1) (e) of PERA by threatening on June 28, 2006 to unilaterally implement changes in existing terms and conditions of employment when the parties had not reached impasse in their negotiations for a new contract. I find no merit to Charging Party's allegations that Respondent engaged in other conduct which violated its duty to bargain in good faith. Based on my findings of fact and conclusions of law, I recommend that the Commission issue the following order.

[2] The June 28 letter failed to reach Neil until the morning of June 30, too late for Charging Party to respond.

## RECOMMENDED ORDER

The City of Detroit, its officers and agents, is hereby ordered to:

1. Cease and desist from threatening to implement changes in existing terms and conditions of employment for employees represented by the Association of Municipal Inspectors without bargaining to impasse or agreement with that labor organization.

2. Post copies of the attached notice to employees in conspicuous places on its premises, including all locations where notices to employees in this bargaining unit are customarily posted. Copies of the notice shall be signed by a representative of the City and shall remain posted for a period of thirty consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____